Supreme Court, U. S.
FILED
DEC 30 1975
MICHAEL RODAK, JR., CLERK

No. 74-1542

In the Supreme Court of the United States

OCTOBER TERM, 1975

UNION ELECTRIC COMPANY, PETITIONER

v.

ENVIRONMENTAL PROTECTION AGENCY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT

ROBERT H. BORK,
Solicitor General,
PETER R. TAFT,
Assistant Attorney General,
A. RAYMOND RANDOLPH, Jr.,
Deputy Solicitor General,
STEPHEN L. URBANCZYK,
Assistant to the Solicitor General,
EDMUND B. CLARK,
KATHRYN A. OBERLY,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	2
Summary of argument	8
Argument:	
Upon judicial review of the EPA Administrator's approval of a state implementation plan under the Clean Air Act, the court may not consider claims that it is economically or technologically infeasible to comply with the state plan	11
A. Petitions for review under Section 307(b)(1), whether filed before or after 30 days from the date of the Administrator's approval of a state plan, can be based only on grounds that the Administrator would have had to consider in approving the plan	12
B. The Administrator is not authorized to refuse to approve a state implementation plan on grounds of economic or technological infeasibility, and a court reviewing the Administrator's action therefore cannot set aside his approval on those grounds	14

599-797—75——1

C. The court should not decide in this case whether, as petitioner contends, due process requires that there be some opportunity in some judicial proceeding for infeasibility claims to be considered ---------- 33
Conclusion ---------- 37

CITATIONS

Cases:

Appalachian Power Co. v. *Environmental Protection Agency*, 477 F. 2d 495------- 23, 30
Duquesne Light Co. v. *Environmental Protection Agency*, (*Duquesne II*), 522 F. 2d 1186, petition for a writ of certiorari filed November 19, 1975 (No. 75–736)--- 31
Indiana & Michigan Electric Co. v. *Environmental Protection Agency*, 509 F. 2d 839 ---------- 16, 23, 27, 35
Natural Resources Defense Council v. *Environmental Protection Agency*, 507, F. 2d 905---------- 16, 18, 23
Red Lion Broadcasting Co. v. *Federal Communications Commission*, 395 U.S. 367 ---------- 32
South Terminal Corp. v. *Environmental Protection Agency*, 504 F. 2d 646---- 16, 23, 25
St. Joe Minerals Corp. v. *Environmental Protection Agency*, 508 F. 2d 743, petition for a writ of certiorari filed June 28, 1975 (No. 74–1650)---------- 23
Train v. *Natural Resources Defense Council, Inc.*, 421 U.S. 60---------- 4, 15, 17, 18, 20, 24, 26, 27, 28, 30, 31, 32
Udall v. *Tallman*, 380 U.S. 1---------- 32

Constitution, statutes and regulations:

United States Constitution, Fifth Amendment ---------- 33
Air Pollution Act of 1955, 69 Stat. 322---- 19
Air Quality Act of 1967, 81 Stat. 485------ 19
Section 107 (81 Stat. 490)---------- 20
Section 108 (81 Stat. 491)---------- 20
Section 108(c)(1) (81 Stat. 492)---- 20
Clean Air Act of 1963, 77 Stat. 392------ 19
Clean Air Act, 77 Stat. 392, as amended by the Clean Air Amendments of 1970, 84 Stat. 1676, 42 U.S.C. 1857 *et seq.*:
Section 102, 42 U.S.C. 1857a--------- 4
Section 107(a), 42 U.S.C. 1857c–2(a)- 26
Section 108(a)(1), 42 U.S.C. 1857c–3 (a)(1) ---------- 3
Section 108(b)(1), 42 U.S.C. 1857c–3 (b)(1) ---------- 20
Section 109(b)(1), 42 U.S.C. 1857c–4 (b)(1) ---------- 2
Section 109(b)(2), 42 U.S.C. 1857c–4 (b)(2) ---------- 2
Section 110, 42 U.S.C. 1857c–5----- 2, 11, 20
Section 110(a), 42 U.S.C. 1857c–5(a)- 3, 27
Section 110(a)(1), 42 U.S.C. 1857c–5(a)(1) ---------- 31, 33
Section 110(a)(2), 42 U.S.C. 1857c–5 (a)(2) -- 2, 3, 9, 11, 15, 16, 17, 18, 23, 28, 31
Section 110(a)(2)(A)---------- 20, 29
Section 110(a)(2)(B), 42 U.S.C. 1857c–5(a)(2)(B) ---------- 9, 25, 27
Section 110(a)(2)(A)–(H), 42 U.S.C. 1857c–5(a)(2)(A)–(H) -------- 3, 15, 27
Section 110(a)(2)(A)(i)---------- 17
Section 110(a)(3), 42 U.S.C. 1857c–5 (a)(3) ---------- 6, 24, 32

Statutes and regulations—Continued
Clean Air Act—Continued

Page

Section 110(c), 42 U.S.C. 1857c-5(c)-- 3, 25
Section 110(d), 42 U.S.C. 1857c-5(d)- 3
Section 110(e), 42 U.S. C. 1857c-5(e)- 17, 31
Section 110(f), 42 U.S.C. 1857c-5(f)- 17, 31
Section 111(a)(1), 42 U.S.C. 1857c-6 (a)(1) ---------- 18
Section 111(a)(2), 42 U.S.C. 1857c-6(a)(2) ---------- 18
Section 113, 42 U.S.C. 1857c-8----- 3, 35, 36
Section 113(a)(1), 42 U.S.C. 1857c-8(a)(1) ---------- 35
Section 113(a)(4), 42 U.S.C. 1857c-8(a)(4) ---------- 35, 36
Section 113(b), 42 U.S.C. 1857c-8(b)- 35
Section 116, 42 U.S.C. 1857d-1------- 9, 25, 26, 27, 30
Section 202, 42 U.S.C. 1857f-1-------- 18
Section 211(c)(2)(A), 42 U.S.C. 1857f-6c(c)(2)(A) ---------- 18
Section 231, 42 U.S.C. 1857f-9-------- 18
Section 307(b)(1), 42 U.S.C. 1857h-5 (b)(1) ---------- 2, 3, 5, 7, 9, 11, 12, 13, 14, 31, 32, 33, 36
Energy Supply and Environmental Coordination Act of 1974, Pub. L. 93-319, 88 Stat. 246 *et seq*.---------- 14
Section 110(a)(3)(A), 42 U.S.C. 1857c-5(a)(3)(A) (88 Stat. 256)---------- 6, 27, 28
Section 110(a)(3)(B), 42 U.S.C. 1857c-5(a)(3)(B) (88 Stat. 256)---------- 14
Motor Vehicle Air Pollution Control Act of 1965, 79 Stat. 992---------- 19
87 Stat. 1676---------- 19

Statutes and regulations—Continued
Clean Air Act—Continued
Revised Missouri Statutes, Section 203.110

Page

(1972) ---------- 4, 34
40 C.F.R. Part 50---------- 3
40 C.F.R. 50.4---------- 4
40 C.F.R. 51.2(b) and (d)---------- 29
40 C.F.R. 51.3---------- 4
40 C.F.R. 51.13---------- 30
40 C.F.R. 52.1320, *et seq*.---------- 4-5
40 C.F.R. 52.1321---------- 4
40 C.F.R. 52.1332---------- 4
Miscellaneous:
Bleicher, *Economic and Technical Feasibility in Clean Air Act Enforcement Against Stationary Sources,* 89 Harv. L. Rev. 316 (1975)---------- 18, 27, 30
Bonine, *Evolution of 'Technology-Forcing' in the Clean Air Act,* Environmental Reporter, Monograph No. 21 (July 25, 1975) ---------- 18
116 Cong. Rec. 16107 (1970)---------- 29
116 Cong. Rec. 32901-32902 (1970)------- 21
116 Con. Rec. 32919 (1970)---------- 21
116 Con. Rec. 33115 (1970)---------- 21
116 Cong. Rec. 42382 (1970)---------- 29
Hearings on Implementation of the Clean Air Act Amendments of 1970 before the Subcommittee on Air and Water Pollution of the Senate Committee on Public Works, 92d Cong., 2d Sess. (1972)------ 22
H.R. 17255, 91st Cong., 2d Sess. (1970)---- 19
H.R. Conf. Rep. No. 1783, 91st Cong., 2d Sess. (1970)---------- 19

Miscellaneous—Continued
Legislative History of the Clean Air Amendments of 1970, Senate Committee on Public Works, 93d Cong., 2d Sess. (1974):
Page
Vol. 1, pp. 111, 123, 151 ---------- 19
Vol. 1, pp. 357–358, 392–393, 531 ------ 19
Vol. 1, pp. 401, 402–403 ---------- 20
Vol. 2, p. 910 ---------- 19
S. 4358, 91st Cong., 2d Sess. (1970) ------- 19
S. Rep. No. 1196, 91st Cong., 2d Sess. (1970) ---------- 20

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74–1542

UNION ELECTRIC COMPANY, PETITIONER

v.

ENVIRONMENTAL PROTECTION AGENCY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINION BELOW

The opinion of the court of appeals (Pet. App. A–1 to A–26) is reported at 515 F. 2d 206.

JURISDICTION

The judgment of the court of appeals (Pet. App. A–27) was entered on March 27, 1975. The petition for a writ of certiorari was filed on June 9, 1975, and was granted, limited to the first question presented by the petition, on October 6, 1975. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, upon review of the EPA Administrator's approval of a state implementation plan under the Clean Air Act, the court may consider claims that it is economically or technologically infeasible to comply with the state plan.

STATUTES INVOLVED

Sections 110(a)(2) and 307(b)(1) of the Clean Air Act, as amended by the Clean Air Amendments of 1970, 84 Stat. 1680, 1708, 42 U.S.C. 1857c–5(a)(2) and 1857h–5(b)(1), are set forth in an appendix to the Memorandum for the Respondent.

STATEMENT

Pursuant to Section 110 of the Clean Air Act, as amended, 42 U.S.C. 1857c–5, each State is required to adopt and submit to the Administrator of the Environmental Protection Agency (EPA) an implementation plan providing for the attainment, maintenance and enforcement of the national "primary" and "secondary" ambient air quality standards promulgated by the Administrator. National primary standards are air quality standards that, in the Administrator's judgment, are "requisite to protect the public health," while secondary standards are those "requisite to protect the public welfare." Sections 109(b)(1) and 109(b)(2), 42 U.S.C. 1857c–4(b)(1) and 1857c–4(b)(2). The Administrator must approve or disapprove a state implementation plan within four months of its

submission. Section 110(a)(2), 42 U.S.C. 1857c–5(a)(2). If he determines that the plan meets the requirements of Section 110(a)(2)(A)–(H), 42 U.S.C. 1857c–5(a)(2)(A)–(H), he is required to approve the plan. If he finds the state plan deficient, he must disapprove it and, after giving the State an opportunity to revise the plan, propose and promulgate his own regulations correcting the deficiency. Section 110(c), 42 U.S.C. 1857c–5(c).[1]

On April 30, 1971, the Administrator promulgated national primary and secondary standards for sulfur dioxide and five other air pollutants that were found to have an adverse effect on the public health and welfare. See Section 108(a)(1), 42 U.S.C. 1857c–3(a)(1); 40 C.F.R. Part 50. Petitioner, who operates coal-burning electric power plants that emit sulfur dioxide, did not seek judicial review of the standards, although entitled to do so under Section 307(b)(1) of the Act, 42 U.S.C. 1857h–5(b)(1), by filing a petition for review within 30 days in the United States Court of Appeals for the District of Columbia Circuit.

The State of Missouri thereafter submitted its implementation plan to the Administrator for the attainment of national ambient air quality standards in each of the State's five air quality control regions.

[1] An implementation plan that either is promulgated by the State and approved by the Administrator, Section 110(a), 42 U.S.C. 1857c–5(a), or is promulgated by the Administrator, Section 110(c), 42 U.S.C. 1857c–5(c), becomes the "applicable implementation plan," Section 110(d), 42 U.S.C. 1857c–5(d), which is enforceable by the Administrator. Section 113, 42 U.S.C. 1857c–8.

599-797—75——2

Prior to this submission, the Administrator had determined that the levels of sulfur dioxide in the State's ambient air exceeded primary standards in only one region—the Metropolitan St. Louis Interstate.[2] 40 C.F.R. 52.1321; see 40 C.F.R. 50.4, 51.3. Accordingly, the State of Missouri's implementation plan included a control strategy and regulations designed to limit emissions of sulfur dioxide from sources in that region.[3] The emission limitations in the plan were immediately effective, but the State retained the authority to grant variances to particular sources which could not immediately comply with the requirements. See Section 203.110, Revised Statutes of Missouri (1972) (note 33, *infra*); cf. *Train* v. *Natural Resources Defense Council, Inc.*, 421 U.S. 60, 69. The implementation plan was explicitly designed to attain primary (as well as secondary) national ambient air quality standards for sulfur dioxide in the Metropolitan St. Louis Interstate region by July 1975, see 40 C.F.R. 52.1332, which was approximately three years after the Administrator's deadline for approving or disapproving the plan.

On May 31, 1972, the Administrator approved the provisions of the plan at issue here. See 40 C.F.R.

[2] A portion of this region is located in Illinois and is subject to regulation by that State. See Sections 102 and 110(a)(2)(E), 42 U.S.C. 1857a and 1857c-5(a)(2)(E).

[3] Many of the regulations, including the regulation at issue in this case, have been in effect as state regulations since March 24, 1967. These regulations were simply incorporated into the plan submitted for EPA's approval under the 1970 Act.

52.1320, *et seq.* Although petitioner's three electric power generating plants in the Greater St. Louis area were subject to the sulfur dioxide restrictions contained in the Missouri implementation plan, petitioner did not seek judicial review of the Administrator's approval of the plan, as it was entitled to do under Section 307(b)(1), 42 U.S.C. 1857h-5(b)(1), by filing within 30 days a petition for review in the court of appeals for the appropriate circuit. Instead, petitioner applied to the appropriate State and county agencies for variances from the emission limitations affecting its plants. Under Missouri law, a variance may be granted for a maximum one-year period, but the variance may be renewed for successive one-year periods upon reapplication by the source. Petitioner had received variances for its three plants, and was applying for a renewal of these variances (see A. 5; Pet. App. A-3, and n. 7),[4] When, on May 31, 1974, the Administrator notified petitioner that its plants were violating the emission limitations for sulfur di-

[4] The variance for petitioner's Labadie plant expired March 28, 1974; the reapplication was filed with the Missouri Air Conservation Commission on March 25, 1974 (and amended on May 7, 1974). The variance for the Sioux plant expired on July 24, 1974, and the reapplication was filed with the Commission on July 19, 1974. Application for a variance for petitioner's Meramec plant was filed with the St. Louis County Air Pollution Control Appeal Board on April 15, 1974. The prior variance for the Meramec plant had expired September 30, 1972. See generally note 33, *infra*, in regard to Missouri's variance process.

oxide contained in the plan.[5] Petitioner then filed the petition at issue in this case in the United States Court of Appeals for the Eighth Circuit, for review of the Administrator's approval in 1972 of the Missouri plan (A. 2–9). The applications for variances pending before the State and county agencies have been tabled until this litigation is resolved.

In its petition for review, petitioner alleged (1) that it faced various economic and technological difficulties in complying with the sulfur dioxide regulations,[6] (2) that sulfur dioxide in the ambient air should no longer be regarded as a health hazard, and (3) that compliance with the state regulations is not necessary for attainment or maintenance of national primary ambient air quality standards in the St. Louis metropolitan area. By claiming that all of these grounds arose more than 30 days after the Administrator's approval of the plan, petitioner attempted to

[5] In regard to the Administrator's enforcement role, see note 1, *supra;* note 34, *infra.* The notice included the Sioux plant, even though the variance for that plant had not expired, because the variance had not been submitted to EPA as a plan revision under Section 110(a)(3) and was therefore not a part of the applicable implementation plan.

[6] More specifically, petitioner alleged (see A. 7–8; Pet. App. A–4, n. 8) that (1) the oil embargo and other economic factors had resulted in such shortages of and high prices for the necessary low-sulfur coal that requiring its use was against the public interest; (2) that adequate sulfur dioxide removal equipment has not been developed; (3) that such equipment is costly; and (4) that petitioner's purchase of such equipment could not realistically be financed.

invoke the provision of the Act permitting a petition for judicial review to be filed more than 30 days after the Administrator's approval of an implementation plan when the petition is "based solely on grounds arising after such 30th day." Section 307(b)(1), 42 U.S.C. 1857h–5(b)(1).

The court of appeals granted motions filed by the Administrator and certain intervenors[7] to dismiss the petition for review for lack of jurisdiction. The court held that Section 307(b)(1) of the Act authorized it to set aside the Administrator's approval of an implementation plan only on grounds—whether arising before or after 30 days from the approval date—that would have required the Administrator to disapprove the plan, and that the economic and technological claims made by petitioner did not constitute such grounds (Pet. App. A–8 to A–24). In light of this holding, the court of appeals found it unnecessary to determine whether the petitioner's allegations of fact were well-founded or whether they arose more than 30 days after the Administrator's approval (Pet. App. A–6 to A–8, A–24).[8]

[7] The Attorney General of the State of Missouri and the Missouri Air Conservation Commission intervened as respondents in the action.

[8] With respect to petitioner's other claims, the court of appeals held that it had no jurisdiction over the claim that the regulations were unnecessary to attain national standards because, in view of the Act's recognition of state authority to adopt requirements more stringent than those needed to attain or maintain national standards, the Administrator could not withhold approval on that basis, and hence the court could not invalidate approval on that ground

SUMMARY OF ARGUMENT

The question in this case is whether a federal court of appeals, in reviewing the EPA Administrator's approval of a state implementation plan under the Clean Air Act, may consider claims that it is economically or technologically infeasible to comply with the plan's requirements. Since the subject of the courts' review in such cases is the Administrator's approval, the relevant inquiry is whether the Administrator is authorized to disapprove a state plan on the ground that it is infeasible. Contrary to petitioner's argument, this is true even when the petition for review is filed more than 30 days from the date of the Administrator's approval; such a petition must allege grounds which, had they been known or in existence at the time the Administrator approved the plan, would have prevented him from giving his approval. To hold otherwise would be inconsistent with the language of Section 307(b)(1), and would also have the unwarranted effect of imposing on federal appellate courts a sig-

(Pet. App. A-25 to A-26). Petitioner did not seek review of this holding in its petition for a writ of certiorari.

The court also held that petitioner's claim that sulfur dioxide is not the health hazard it was once thought to be was not properly before the court because that was effectively a challenge to the Administrator's promulgation of national standards for sulfur dioxide, which should be presented in the first instance to the Administrator and which, in any event, could be the subject of judicial review under the Act only in the United States Court of Appeals for the District of Columbia Circuit (Pet. App. A-24 to A-25). See Section 307(b)(1), 42 U.S.C. 1857h-5(b)(1). Petition raised this issue in its petition for a writ of certiorari as the fourth question presented (Pet. 3), but the Court granted the petition only as to the first question presented (Pet. Br. 3).

nificant responsibility for administering the Act and the implementation plans.

The Administrator must approve a state implementation plan if it satisfies the eight requirements of Section 110(a)(2), 42 U.S.C. 1857c-5(a)(2). In pertinent part, Section 110(a)(2) requires the Administrator to examine state plans to see that they contain emission limitations necessary for the timely attainment of national ambient air quality standards. There is no requirement in Section 110(a)(2) that the Administrator consider whether compliance with these emission limitations is feasible. Indeed, the structure and history of the Act indicate that the Administrator must approve a plan which satisfies the requirements of Section 110(a)(2) even if it may be economically or technologically infeasible for some sources to comply with the plan's emission limitations.

The Administrator must approve a plan which complies with Section 110(a)(2)'s criteria even if the plan will achieve a higher quality of ambient air than required by the national standards. Under Section 116, 42 U.S.C. 1857d-1, States have the power to promulgate more stringent limitations than necessary to achieve national standards. And such limitations may be submitted to EPA as part of the state implementation plan. The term "necessary" in Section 110(a)(2)(B) means only that the plan must, at a minimum, contain the limitations needed to attain national standards. This view is supported by provisions of the Clean Air Act which show that Congress permitted state implementation plans to contain more stringent

limitations than necessary. And it is supported by the structure of the Act, which gives States a significant role in effectuating air pollution programs. The States are to make the important decisions regarding the imposition of emission controls; challenges to the wisdom of these decisions should therefore be to the appropriate state agency (as petitioner is doing in this case), and not to federal appellate courts.

Should this Court hold otherwise, EPA would be subjected to an impossible administrative burden which would jeopardize the timely attainment of even the minimum national standards. Congress could not have intended this result.

In light of the above, we submit that EPA's interpretation of the Act as not authorizing it to disapprove a plan on the ground that compliance may be infeasible for some sources—an interpretation which is entitled to great weight because of EPA's responsibility for administering the Act—should be upheld; neither petitioner nor *amici* have shown a compelling reason why that interpretation is incorrect. Since the Administrator may not disapprove a state plan on infeasibility grounds, federal courts of appeals reviewing the Administrator's approval of a state plan also may not consider such grounds.

Petitioner's claim that such a result deprives it of due process was not briefed in the court of appeals and is not a part of the first question presented in the petition for a writ of certiorari, the only question accepted for review by the Court. In any event, the

claim is premature. It rests on the premise that judicial consideration of feasibility factors must be available at some time. There are, however, other occasions when a state or federal court may consider claims of infeasibility. The question whether petitioner has a constitutional right to raise such claims in the context of these other judicial proceedings cannot appropriately be decided by the Court in this case.

ARGUMENT

UPON JUDICIAL REVIEW OF THE EPA ADMINISTRATOR'S APPROVAL OF A STATE IMPLEMENTATION PLAN UNDER THE CLEAN AIR ACT, THE COURT MAY NOT CONSIDER CLAIMS THAT IT IS ECONOMICALLY OR TECHNOLOGICALLY INFEASIBLE TO COMPLY WITH THE STATE PLAN

After the EPA Administrator approves a state implementation plan under Section 110 of the Act, 42 U.S.C. 1857c–5, his action is subject to review in the court of appeals pursuant to Section 307(b)(1), 42 U.S.C. 1857h–5(b)(1). The petition for judicial review must be filed within 30 days of the Administrator's approval unless it rests solely on grounds arising after that date. Regardless when the Section 307(b)(1) suit is begun, however, in our view certain claims may not be used as a basis for challenging the Administrator's approval of a state plan.

Thus, it makes no difference that petitioner here sought judicial review only after the 30-day period had expired: the question presented—whether claims of economic or technological infeasibility may be con-

599-797—75——3

sidered in Section 307(b)(1) suits—must be treated the same as if petitioner had filed within the 30-day period. In Part A of the argument that follows we explain why the issue in both situations depends on whether the Administrator has authority to refuse to approve an economically or technologically infeasible state implementation plan. In Part B, *infra,* we argue that under Section 110(a)(2) the Administrator has no such authority. Finally, in Part C, *infra,* we discuss petitioner's contention that the foregoing result may be a denial of due process.

A. PETITION FOR REVIEW UNDER SECTION 307 (b)(1), WHETHER FILED BEFORE OR AFTER 30 DAYS FROM THE DATE OF THE ADMINISTRATOR'S APPROVAL OF A STATE PLAN, CAN BE BASED ONLY ON GROUNDS THAT THE ADMINISTRATOR WOULD HAVE HAD TO CONSIDER IN APPROVING THE PLAN

Regardless of when the Section 307(b)(1) petition is filed in the court of appeals, the subject of judicial review is, as the statute says, "the Administrator's action in approving * * * [an] implementation plan * * *." Thus, to obtain review of the Administrator's approval of an implementation plan more than 30 days after the approval, the petitioner must allege "grounds" which, had they been known or in existence at the time the Administrator approved the plan, would have prevented him from giving his approval. If, as we argue in Part B, *infra,* economic and technological factors cannot be considered by the Administrator at the time of initial approval, such factors similarly have no bearing in a subsequent

challenge in the court of appeals—whether filed before or after expiration of the 30-day period. To hold otherwise not only would be inconsistent with the language of Section 307(b)(1) but also would contravene the purpose and policies underlying the Act.

Petitioner seems to suggest (Br. 13) that even if the EPA Administrator cannot consider economic and technological feasibility at the plan-approval stage, the same factors can later be raised in the court of appeals for the purpose of challenging his approval of the state plan, provided only that the events giving rise to the claims occurred more than 30 days after the EPA Administrator's action. But such a conclusion would make the federal appellate courts responsible for administering a significant part of the Act and the implementation plans, despite the fact that expert federal and state administrative systems exist for this purpose.[9] It would require, as the court of appeals stated, that the reviewing court "sit as a super-legislature balancing the necessity of compliance with the clean air standards against competing economic and technological considerations" (Pet. App. A–23). If, as we argue below, Congress did not intend the EPA Administrator to base his approval of a state plan on whether it would be feasible for

[9] As we discuss *infra*, pp. 17, 27–29, 33–36, claims of infeasibility, although not relevant to whether a plan will be approved (and therefore not relevant in a Section 307(b)(1) proceeding), can be considered and acted upon in other contexts in order to provide relief for a polluter who is unable to comply with the state plan's requirements.

polluters to comply, Congress could not have intended to thrust this task on the courts of appeals, whose responsibility under Section 307(b)(1) is to review the Administrator's approval, not to decide according to some unspecified standard that the state plan should be modified or rejected in light of economic or technological considerations.[10]

B. THE ADMINISTRATOR IS NOT AUTHORIZED TO REFUSE TO APPROVE A STATE IMPLEMENTATION PLAN ON GROUNDS OF ECONOMIC OR TECHNOLOGICAL INFEASIBILITY AND A COURT REVIEWING THE ADMINISTRATOR'S ACTION THEREFORE CANNOT SET ASIDE HIS APPROVAL ON THOSE GROUNDS

As we discussed above, the petition under Section 307(b)(1) is for judicial review of the Administrator's action and if the Administrator cannot disapprove a state implementation plan on economic or technological infeasibility grounds, such claims are also not cognizable upon a petition for review in the court of appeals. Thus, the relevant inquiry is whether the Administrator must disapprove a state implementation plan that is economically or technologically infeasible for certain emission sources.

The Administrator's power to approve or disapprove a state implementation plan is explicitly circumscribed by the Act. Section 110(a)(2) requires the Administrator to approve a state implementation plan that conforms to eight specified requirements. See Section 110(a)(2)(A)–(H), 42 U.S.C. 1857c-5(a)(2)(A)–(H); *Train* v. *Natural Resources Defense Council, Inc.* (*"NRDC"*), 421 U.S. 60, 79. If the state implementation plan contains emission limitations that are necessary for the attainment of national primary ambient air quality standards not later than three years from the date of approval, the Administrator cannot reject it because these emission limitations may be infeasible for some emission sources.

This much is apparent from Section 110(a)(2), which provides in relevant part:

> * * * The Administrator shall approve [a state implementation plan] * * * if he determines * * * that—
>
> (A)(i) in the case of a plan implementing a national primary ambient air quality standard, it provides for the attainment of such primary

[10] Recent amendments to the Act, the Energy Supply and Environmental Coordination Act of 1974, Pub. L. 93-319, 88 Stat. 246, are designed to take into account some of the factors that, in petitioner's view, constitute "significant new information" justifying late review under Section 307(b)(1). In these new amendments, Congress recognized the need for some degree of accommodation between the goals of the Clean Air Act and the problems created by the energy shortage. Congress therefore amended Section 110 by adding Section 110(a)(3)(B), 88 Stat. 256, pursuant to which the Administrator must review state implementation plans to determine whether their restrictions for fuel-burning stationary sources may be relaxed without interfering with the timely attainment and maintenance of the national air quality standards. If the Administrator determines that such a relaxation could be made, he is to notify the State that it may submit a plan revision. Petitioner argues (Pet. Br. 28) that Congress lacks the "flexibility to deal with" the new information that is the basis of its petition for review. But in view of the Energy Supply and Environmental Coordination Act, petitioner's argument is merely a way of saying that it "[took its] case to Congress" (Pet. Br. 28), but failed to obtain all of the relief it desired. See note 25, *infra*.

> standard as expeditiously as practicable but * * * in no case later than three years from the date of approval of such plan * * *; [and]
>
> (B) it includes emission limitations, schedules, and timetables for compliance with such limitations, and such other measures as may be necessary to insure attainment and maintenance of such primary * * * standard * * *;
>
> * * * * *

This language requires the Administrator to ascertain whether the State's plan contains the necessary emission limitations, that is, specific rules to which sources of pollution are subject and which, if enforced, would insure the timely attainment of national primary ambient air quality standards. The language does not require the Administrator to ascertain whether compliance with these necessary emission limitations is feasible. On the contrary, the mandatory wording of the statute indicates that feasibility considerations are irrelevant under Section 110(a)(2) particularly when the result of taking them into account would be nonattainment of the air quality standard. See, *e.g., Indiana & Michigan Electric Co.* v. *Environmental Protection Agency,* 509 F. 2d 839, 844 (C.A. 7); *Natural Resources Defense Council, Inc.* v. *Environmental Protection Agency,* 507 F. 2d 905, 914 (C.A. 9); *South Terminal Corp.* v. *Environmental Protection Agency,* 504 F. 2d 646, 675 (C.A. 1).

That the Administrator is not required to ascertain whether compliance with necessary limitations is feasible becomes even more certain when Section

110(a)(2) is compared with Sections 110(e) and 110(f), 42 U.S.C. 1857c-5(e) and 1857c-5(f). Section 110(e) permits the Administrator to allow a two-year extension of the three-year deadline provided for in Section 110(a)(2)(A)(i) if he finds that compliance with the requirements of the state implementation plan is not technologically feasible. But the Administrator is to consider the extension only if it is requested by the Governor of the State at the time the implementation plan is submitted, and the Administrator may grant the extension only if the State has provided reasonable interim controls. Section 110(f) permits the Administrator, upon application from the Governor of the State, to allow a one-year postponement of any compliance date in an implementation plan if the Administrator finds that compliance is infeasible and that "the continued operation of [the emission source] is essential to national security or to the public health or welfare * * *." This Court has construed Section 110(f) as "a safety valve by which may be accorded, under certain carefully specified circumstances, exceptions to the national standards themselves." *Train* v. *NRDC, supra,* 421 U.S. at 81; see *id.* at 81–87.

Beyond the carefully limited circumstances of Sections 110(e) and 110(f), however, the Administrator may not permit timely attainment of national standards to be compromised on the basis of claims that compliance with necessary emission limitations is in-

feasible.[11] See *Natural Resources Defense Council, Inc.* v. *Environmental Protection Agency, supra,* 507 F. 2d at 914; Bleicher, *Economic and Technical Feasibility in Clean Air Act Enforcement Against Stationary Sources,* 89 Harv. L. Rev. 316, 321, 332, and n. 86, 338 (1975).[12]

The meaning we have derived from the Act's language and structure is amply supported by the Act's legislative history. The Clean Air Amendments of 1970 represent a new approach. See *Train* v. *NRDC, supra,* 421 U.S. at 63–67.[13] Early efforts in the

[11] In other sections of the Act, dealing with different concerns, Congress specifically made economic and technological factors relevant. For example, a standard of performance for new stationary sources is defined as "a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction) the Administrator determines has been adequately demonstrated." Section 111(a)(1), 42 U.S.C. 1857c–6(a)(1). See Section 111(a)(2), 42 U.S.C. 1857c–6(a)(2). In light of this specific mention of economic and technological factors, the omission of these factors from Section 110(a)(2) cannot be viewed as mere oversight, but instead represents a deliberate legislative judgment that such factors are simply not relevant at the plan-approval stage. See also Sections 202 (42 U.S.C. 1857f–1), 211(c)(2)(A) (42 U.S.C. 1857f–6c(c)(2)(A), 231 (42 U.S.C. 1857f–9).

[12] From 1972 to 1975, the author of the above cited article, Professor Samuel A. Bleicher, served as a Deputy Director for Regulation and Enforcement in the Ohio Environmental Protection Agency.

[13] For a detailed synopsis of Congress' earlier attempts to control air pollution, and of the legislative history of the 1970 amendments, see Bonine, *The Evolution of 'Technology-Forcing' in the Clean Air Act,* Environmental Reporter, Monograph No. 21 (July 25, 1975). Mr. Bonine is a deputy associate general counsel of the Environmental Protection Agency, although the piece was written by Mr. Bonine in his private capacity.

field of air pollution control focused on federal funding of research and development designed to advance control technology. See the Air Pollution Act of 1955, Pub. L. 74–159, 69 Stat. 322; the Clean Air Act of 1963, Pub. L. 88–206, 77 Stat. 392. When sources of pollution failed to use the new technology, federal legislation was adopted to require that they do so. See the Motor Vehicle Air Pollution Control Act of 1965, Pub. L. 89–272, 79 Stat. 992; the Air Quality Act of 1967, Pub. L. 90–148, 81 Stat. 485. The requirements were tied to available technology and the impetus for technological development was still public funding of research and development.

The rate of progress in the nationwide effort to control air pollution proved unsatisfactory, and in 1970 both houses of Congress passed amendments to the Clean Air Act. See S. 4358, 91st Cong., 2d Sess. (1970) ("Senate Bill") (reprinted at 1 Legislative History of the Clean Air Amendments of 1970, Senate Committee on Public Works, 93d Cong., 2d Sess. 357–358, 392–393, 531 (1974) ("Leg. Hist.")); H.R. 17255, 91st Cong., 2d Sess. (1970) ("House Bill") (reprinted at 2 Leg. Hist. 910). There were substantial differences in the two bills; in conference, the more stringent Senate version largely prevailed. See H.R. Conf. Rep. No. 1783, 91st Cong., 2d Sess. (1970) (reprinted at 1 Leg. Hist. 151); 1 Leg. Hist. 111 (House consideration of the conference committee report), 123 (Senate consideration of the conference committee report). The conference's product was adopted by both houses, and signed into law December 31, 1970, Pub. L. 91–604, 84 Stat. 1676.

599–797—75——4

The Act represents two significant departures from previous efforts. First, air quality standards were to be set solely with regard to the public health and welfare rather than in light of available technology.[14] Second, primary standards were to be met, not in a reasonable time, as the House Bill had provided,[15] but "as expeditiously as practicable but * * * in no case later than three years * * *," Section 110(a)(2)(A), 42 U.S.C. 1857c–5(a)(2)(A), as the Senate Bill had required. See *Train* v. *NRDC, supra,* 421 U.S. at 66–67. The "technology-forcing" approach inherent in these two elements of the Act is explicitly recognized in the Senate Report (S. Rep. No. 1196, 91st Cong., 2d Sess. 2–3 (1970) (reprinted at 1 Leg. Hist. 401, 402–403)):

> In the Committee discussions, considerable concern was expressed regarding the use of the concept of technical feasibility as the basis of ambient air standards. The Committee determined that 1) the health of people is more important than the question of whether the early achievement of ambient air quality standards protective of health is technically feasible; and, 2) the growth of pollution load in many areas, even with application of available technology, would still be deleterious to public health.

[14] Compare Sections 107 and 108 of the Air Quality Act of 1967, Pub. L. 90–148, 81 Stat. 485, 490, 491, with Sections 108(b)(1) and 110 of the Clean Air Act as amended in 1970, 42 U.S.C. 1857c–3(b)(1) and 1857c–5.

[15] Compare also Section 108(c)(1) of the Air Quality Act of 1967, Pub. L. 90–148, 81 Stat. 492.

> Therefore, the Committee determined that existing sources of pollutants either should meet the standard of the law or be closed down * * *.[16]

[16] Senator Muskie, the manager of the Senate Bill, stated during the floor debates (116 Cong. Rec. 32901–32902 (1970)):

"The first responsibility of Congress is not the making of technological or economic judgments—or even to be limited by what is or appears to be technologically or economically feasible. Our responsibility is to establish what the public interest requires to protect the health of persons. This may mean that people and industries will be asked to do what seems to be impossible at the present time.

* * * * *

"Mr. President, I should like to make the philosophy of the bill clear, with this emphasis:

"Predictions of technological impossibility or infeasibility are not sufficient as reasons to avoid tough standards and deadlines, and thus to compromise the public health."

Senator Cooper likewise noted that Congress was intentionally placing demands on industry (*id.* at 32919):

"Mr. President, in presenting this general outline of the plan of attack on air pollution provided by the bill, it might as well be said that the philosophy of the bill abandons the old assumption of requiring the use of only whatever technology is already proven and at hand and of permitting pollution to continue when it is not economically feasible to control it. The bill proceeds instead to set out what is to be achieved, and places its reliance on a great effort to develop technology, to train and put to work the manpower to accomplish that purpose, and it assumes a readiness by industry and the people or the country to pay the costs of pollution control."

And Senator Prouty, summing up both Title I (dealing with stationary sources) and Title II (dealing with moving sources, primarily automobiles), stated (*id.* at 33115):

"An innovative feature of the bill, in keeping with the urgency of the problem, is the establishment of definite deadlines. State

In describing the work of the Conference Committee, Senator Eagleton later pointed out (Hearings on Implementation of the Clean Air Act Amendments of 1970 before the Subcommittee on Air and Water Pollution of the Senate Committee on Public Works, 92d Cong., 2d Sess., pt. 1, p. 21 (1972)):

> On this question of an economic factor, I am as positive about this as a mortal can be, that was specifically written out of the bill because many hours were spent in conference debating the economic feasibility factor and the House had such language in the bill as:
>
> "Giving due consideration to economic and technological feasibility of compliance."
>
> That appeared in more than one place in the House bill and it was stricken from the bill in conference to go back to the Senate version which had no economic factor as far as protection of public health was concerned.

Thus, the language, structure, and history of the Clean Air Amendments of 1970 demonstrate that state implementation plans containing limitations necessary for the attainment of national primary ambient air quality standards not later than three years from the date of approval must be approved by

implementation plans must be designed to assure attainment of national ambient air quality standards within 3 years of acceptance. The auto manufacturers are required to reduce pollutant emissions by 90 percent on their 1975 models. In each case the basic tenet of the new bill is explicit; for the first time, air quality standards will take precedence over objections of economic impracticality and technical impossibilities."

the Administrator despite claims that compliance with such limitations is infeasible. In addition to the court below, other courts of appeals have adopted this conclusion.[17] As the Ninth Circuit stated in *Natural Resources Defense Council, Inc.* v. *Environmental Protection Agency, supra,* 507 F. 2d at 914, the Act

> clearly evince[s] * * * [an] intent to realize national ambient air standards despite economic cost and in spite of the possibility that some business enterprises, unable to comply with a state's plan so as to enable that state to attain national standards within the prescribed time period, might have to terminate operations.

See also *Indiana & Michigan Electric Co.* v. *Environmental Protection Agency, supra,* 509 F. 2d at 844 ("a plan's technological feasibility and economic impact are not among the factors which the Administrator is obliged to consider under Section 110(a)(2), and that where a state's implementation plan satisfies the criteria set forth therein, the statute quite specifically requires the Administrator to approve it"); *South Terminal Corp.* v. *Environmental Protection Agency, supra,* 504 F. 2d at 675.[18]

[17] But see *St. Joe Minerals Corp.* v. *Environmental Protection Agency,* 508 F. 2d 743 (C.A. 3), petition for a writ of certiorari filed June 28, 1975 (No. 74–1650); *Appalachian Power Co.* v. *Environmental Protection Agency,* 477 F. 2d 495 (C.A. 4).

[18] There the First Circuit stated:

"The material portions of the Clear Air Act itself do not mention economic or social impact, and it seems plain that Congress intended the Administrator to enforce compliance with air qual-

This Court's opinion in *Train* v. *NRDC, supra,* suggests agreement with the conclusion that the Administrator must approve a state implementation plan even if not every source of emission will find it economically or technologically feasible to comply. The Court there stated (421 U.S. at 71, n. 11): "§110(a)(2) quite clearly mandates approval of any plan which satisfies its minimum conditions." Feasibility is not one of the conditions.[19]

In this case, however, it is argued that when the state implementation plan does more than meet minimum conditions—when, as was alleged here,[20] the

ity standards even if the costs were great. Particularly in the case of primary standards—those set as 'requisite to public health'—Congress' position is not extreme or unprecedented. Minimum public health requirements are often, perhaps usually, set without consideration of other economic impact. Thus, insofar as petitioners claim that either EPA or ourselves would be empowered to reject measures necessary to ensure compliance with primary air quality standards simply because after weighing the advantages of safe air against the economic detriment, we thought the latter consideration took priority, petitioners would be incorrect. Congress has already made a judgment the other way, and EPA and the courts are bound."

[19] The case dealt with EPA's authority to approve a State's "revision" of a plan previously approved, but since EPA's authority to approve revisions is subject to the same limitations as its authority to approve plans in the first instance (Section 110(a)(3), 42 U.S.C. 1857c-5(a)(3)), the Court's analysis is pertinent to the question in this case.

[20] The petition for judicial review alleges "that compliance with [the emission limitations applicable to petitioner's power plants] is not necessary for the fulfillment of the national primary ambient air quality standards * * *" (A. 8).

state plan will achieve a higher quality of ambient air than required by national standards—the EPA Administrator must consider claims of economic or technological infeasibility in determining whether to approve the plan even if, as we have argued above, he is precluded from doing so in regard to plans that go no further than the minimum (Br. *Amici Curiae for* Appalachian Power Co., *et al.,* pp. 13–38).[21] The argument appears to be that since Section 110(a)(2)(B) requires state plans to contain such emission limitations "as may be necessary" to achieve national standards, the Administrator must disapprove state plans that would result in exceeding those standards (*id.* at 21–23, 37–38).

In the first place, even if the Administrator could disapprove a state plan on such grounds, it is difficult to understand what this has to do with the issue here—whether economic or technological infeasibility can serve as a ground for the Administrator's reject-

[21] Two of the cases said to support this conclusion, *South Terminal Corp.* v. *Environmental Protection Agency, supra,* 504 F. 2d at 676, and *District of Columbia* v. *Train,* 521 F. 2d 971, 997 (C.A. D.C.), consider EPA's obligation under Section 110(c), 42 U.S.C. 1857c-5(c), when it promulgates an implementation plan after a State has failed to do so. This is an entirely different situation than is presented by this case, where the Administrator did not promulgate a plan but simply approved one that had been promulgated by the State. As we discuss below, when a State promulgates a plan, it has the power under Section 116, 42 U.S.C. 1857d-1, to be "more stringent" than required by the Act. Section 116 is not available to the Administrator when he promulgates an implementation plan.

ing a state plan. An examination into the feasibility of the state plan scarcely helps to determine whether the emission limitations it contains will achieve a certain quality of ambient air. If the Administrator must examine plans to determine whether they are more stringent than required by the national standards, his task will not be aided by an inquiry into economic or technological factors. Under such a scheme the Administrator's approval would not depend on whether the plan is technologically or economically feasible. Presumably, the Administrator could not approve a plan designed to better the national standards even if it were feasible for emission sources to comply.

In any event, the fact that a state implementation plan will achieve a higher standard cannot serve as a basis for the Administrator's disapproval of the plan. Under Section 116, 42 U.S.C. 1857d–1, States retain the power to adopt and to enforce standards and emission limitations designed to achieve a higher quality of ambient air than is required by national standards. And the States have the responsibility for developing specific limitations to which sources of pollution are subject and which will insure attainment of the national ambient air standards set by EPA. See Section 107(a), 42 U.S.C. 1857c–2(a); *Train* v. *NRDC, supra,* 421 U.S. at 79. When they exercise this responsibility, the Administrator's duty is to make certain they have done enough, not to reject their efforts because they have done more than the minimum required of them. That would be inconsistent not only

with Congress' recognition of the States' role in controlling air pollution, but also with Section 110(a)(2)(B), which directs the Administrator to approve a state plan if it contains what is "necessary" to attain and maintain the national standards. See *Indiana & Michigan Electric Co.* v. *Environmental Protection Agency, supra,* 509 F. 2d at 843–844, nn. 1 and 2.[22]

What we have just said becomes even more certain in light of Section 110(a)(3)(A) (as amended by Pub. L. 93–319, 88 Stat. 256),[23] which directs the Administrator to approve variances from a State's emission limitations when the variance meets the same requirements (Section 110(a)(2)(A)–(H)) applicable to the initial approval of plans. See *Train* v. *NRDC, supra.* Two of those requirements, as we pointed out (pp. 15–16, *supra*), are that the plan provide for the attainment of national ambient air quality standards and contain the emission limitations that will do so. Section 110(a)(3)(A) thus antici-

[22] To read the term "necessary" as setting not only the minimum for state plans but also the maximum, as *amici* proposes (Br. 37–38), means that a State would have to adopt two sets of regulations to effectuate its power to establish and enforce stricter standards—one set of regulations to attain national standards but no more (under Section 110(a)), and another to attain the State's own desired standards (under Section 116). The impracticality of such a result belies any suggestion that Congress intended to require the Administrator to disapprove a plan promulgated under Section 110(a) which also serves the State's interest under Section 116 of achieving higher than minimum standards. See Bleicher, p. 18, *supra*, at 321, 351.

[23] The amendments merely added "(A)" to the provision, which is otherwise the same as when it was construed in *Train* v. *NRDC*, *supra.*

pates either that a State may want to upgrade the limitations in a plan already designed to attain the national standards, in order to achieve a higher standard, or that States may want to downgrade limitations in a plan that is presently more stringent than necessary to attain the national standards.[24] Neither situation could arise unless state implementation plans may contain more stringent limitations than necessary to attain national standards.[25]

The decision whether to include such limitations is thus left to the States, and "the Agency [has] no authority to question the wisdom of a State's choices * * *." *Train* v. *NRDC, supra,* 421 U.S. at 79. Congress fully expected that, before finalizing approvable plans, States would consider issues such as economic and technological feasibility, and would make the significant policy decisions then, before the plan reached EPA for federal review and approval.[26] But the Administrator cannot disapprove a state plan if it is more stringent than required and he likewise cannot reject a plan because some source or sources may find compliance infeasible.[27] In this case, petitioner's objections that it cannot comply with the state plan is a challenge to the wisdom of the State's choice and the appropriate place to resolve such matters is not in the federal court of appeals but in the responsible state agency. That indeed is the course petitioner is pursuing by seeking variances from the limitations affecting its three plants (A. 5). See p. 5, *supra.*

[24] Revisions may also be used to rearrange the mix of limitations in order to attain the national standards with a different allocation of burdens. See note 27, *infra.*

[25] The Energy Supply and Environmental Coordination Act of 1974, Pub. L. 93–319, 88 Stat. 246, amended the Clean Air Act in response to the fuel shortages in late 1973 and early 1974. As we explained in note 10, *supra*, the pertinent provision of that Act requires the Administrator to review state implementation plans to determine whether their restrictions for fuel-burning stationary sources may be relaxed without interfering with the timely attainment and maintenance of national air quality standards. If the Administrator determines that such a relaxation could be made, he is to notify the State that it may but need not submit a plan revision. Any such revision must be approved by the Administrator if it satisfies the requirements of Section 110(a)(2) applicable to initial plan approvals. This provision reflects congressional awareness that implementation plans may contain limitations that are more stringent than necessary to attain national standards. More important, it is indicative of congressional approval of this fact, since the provision requires the Administrator to notify the State merely that it may make the limitations less stringent, but does not authorize the Administrator to compel such changes.

[26] See 116 Cong. Rec. 42382 (1970) (remarks of Senator Muskie); *id.* at 16107 (remarks of Senator Cooper). EPA's regulations on the promulgation of implementation plans explicitly provide that a State may consider economics in determining how plan requirements are to be apportioned among subject sources, provided such allocation is sufficient to achieve ambient air standards within the deadlines established by Section 110(a)(2)(A) of the Act. See 40 C.F.R. 51.2(b) and (d).

[27] Pointing to the requirements that primary standards be achieved "as expeditiously as practicable but * * * in no case later than three years * * *," and that secondary standards be achieved in "a reasonable time * * *," Section 110(a)(2)(A), 42 U.S.C. 1857c–5(a)(2)(A), the *amici* utility companies argue that when, for example, an implementation plan seeks to achieve primary standards in less than three years, an emission source ought to be able to argue to the Administrator that this expeditiousness is not "practicable," and that the measure of a plan's practicability is its feasibility (Br. 13–16).

The question of the Administrator's obligation under the phrases "as expeditiously as practicable" and "a reasonable time" is not before the Court; petitioner here has made no claim of "temporal stringency" with respect to either primary or secondary standards.

In any event, under Section 116 of the Act, States may require

To hold otherwise would be to subject EPA to an impossible administrative burden, a result Congress could not have intended. States were required to attain air quality of specified standards in most cases within approximately four and one-half years from

the early attainment of national standards, just as they may require the attainment of stricter standards. In the case of primary standards, the phrase "as expeditiously as practicable" requires only that the Administrator determine whether a more expeditious attainment date than is provided in the State's plan is practicable. It does not require the Administrator to judge whether the date actually chosen by the State is impracticable. As with requests for relief from implementation plans that seek to attain higher standards of quality than required by the federal standards, the appropriate forum for relief from early attainment dates is the State, where the State's policy decisions can be fully reconsidered.

Also, the Administrator may not question a State's choice among alternative combinations of emission limitations designed to achieve national standards. Generally, each State develops an implementation plan by determining the amount of emissions which may be allowed in a region consistent with the attainment and maintenance of the standards, and then by allocating this amount among the sources. See 40 C.F.R. 51.13; Bleicher, p. 18, *supra*, at 325, 327–329. When a region has several sources of an emission, this "load allocation" decision presents a State with a number of alternatives. It is argued (*Amici* Br. 17–18, citing *Appalachian Power Co.* v. *Environmental Protection Agency*, 477 F. 2d 495, 506 (C.A. 4)) that the Administrator is to consider claims of infeasibility to determine whether one or another of the alternatives to the plan will work. Aside from the point, that, theoretically, an "infeasible" plan *will* work because it could require the pollution source to shut down, *amici*'s argument is foreclosed by *Train* v. *NRDC*, *supra*, 421 U.S. at 79, in which the Court said:

"[S]o long as the ultimate effect of a State's choice of emission limitations is compliance with the national standards for ambient air, the State is at liberty to adopt whatever mix of emission limitations it deems best suited to its particular situation."

the passage of the Act,[28] with approximately a year and a half for promulgation of national standards and promulgation and approval of state implementation plans, and three years (or more expeditiously, if practicable) after plan approval for attainment of the primary standards.[29] Although the timetable called for all States to submit their implementation plans to EPA at approximately the same time—nine months after EPA had promulgated national ambient air quality standards—EPA was given but four months in which to analyze and pass upon these plans. Section 110(a)(1) and (2), 42 U.S.C. 1857c-5(a)(1) and (2).

Yet throughout the country there are hundreds of thousands of stationary emission sources that are subject to regulation under the Clean Air Act. Presumably, if petitioner's contention were accepted, EPA would have to evaluate, for each source in each State, whether it would be unable, due to economic or technological infeasibility, to comply with the restrictions.[30] Such a task would present an insur-

[28] But see Sections 110(e) and 110(f), 42 U.S.C. 1857c-5(e) and 1857c-5(f), which provide for limited exceptions to this schedule.

[29] See *Train* v. *NRDC*, *supra*, 421 U.S. at 65–67, 68 ("No one can doubt that Congress imposed upon the Agency and States a comprehensive planning task of the first magnitude which was to be accomplished in a relatively short time.").

[30] Such review, if required at all, would probably have to be source specific because economic and technological factors vary from source to source and plan approvals based on broad-based studies would be subject to challenges under Section 307(b)(1) on the ground that the source's particular problems were not contemplated by the study. See *Duquesne Light Company* v. *Environmental Protection Agency*, 522 F. 2d 1186 (C.A. 3), petition for a writ of certiorari filed November 19, 1975 (No. 75-736) (illustrating the detailed study of feasibility factors that might be demanded by a court of appeals).

mountable obstacle to EPA's timely approval of state plans.[31]

In light of the language, history and underlying policies of the Clean Air Act, we submit that EPA's interpretation of the Act—as not authorizing it to disapprove a state implementation plan on grounds that it may be infeasible for some pollution sources to comply—not only is sufficiently reasonable to be upheld by the courts, but also is correct. As in *Train* v. *NRDC, supra,* 421 U.S. at 87, EPA's interpretation of the Act is entitled to great weight, for EPA is "charged with administration of the Act." The "construction of a statute by those charged with its execution should be followed unless there are compelling indications that it wrong,"[32] and here there are no such indications.

[31] While EPA has already approved the initial round of state implementation plans, a requirement that the Administrator consider economic and technological feasibility factors might well generate a raft of petitions for review of previously approved plans under Section 307(b)(1)'s savings provision. Furthermore, EPA anticipates additional rounds of plan approvals. Air quality data now being analyzed demonstrate that some urban areas are not attaining national primary standards despite the fact that limitations currently in force are generally being met. The States will have to respond with revised plans containing stricter limitations, and these revisions will be subject to the same challenges as the initial plan. See Section 110(a)(3), 42 U.S.C. 1857c-5(a)(3). Finally, EPA expects that it will in due course adopt national standards for additional pollutants, or revised standards for pollutants that are already subject to regulation, and this would occasion another round of plan approvals.

[32] *Red Lion Broadcasting Co.* v. *Federal Communications Commission*, 395 U.S. 367, 381, quoted with approval in *New York Dept. of Social Services* v. *Dublino*, 413 U.S. 405, 421. See also *Udall* v. *Tallman*, 380 U.S. 1, 16–18.

C. THE COURT SHOULD NOT DECIDE IN THIS CASE WHETHER, AS PETITIONER CONTENDS, DUE PROCESS REQUIRES THAT THERE BE SOME OPPORTUNITY IN SOME JUDICIAL PROCEEDING FOR INFEASIBILITY CLAIMS TO BE CONSIDERED

Petitioner contends that if it cannot raise claims of infeasibility in a petition for review under Section 307(b)(1), this would be a violation of the Due Process Clause of the Fifth Amendment. This contention, which petitioner did not make in its brief to the court of appeals, was raised in the petition for a writ of certiorari as the third question presented (Pet. 2). The Court, however, granted the petition only as to the first question presented (Pet. Br. 3).

The due process issue is not properly before the Court. As we noted in the memorandum filed in response to the petition for a writ of certiorari in this case (pp. 8–9), petitioner's contention is premature. Petitioner asserts that "a constitutional interpretation of the Clean Air Act Amendments requires *at some time* judicial consideration (and a hearing) of the technological and economic factors * * *" (Pet. Br. 30–31; emphasis in original). But even if accurate this does not lead to the conclusion that the "judicial consideration" must come in a federal appellate court reviewing the Administrator's approval of a state plan.

There are other occasions when infeasibility claims might be presented to a court. For example, since a state implementation plan represents legislative and administrative decisions made by a State "after reasonable notice and public hearings" (Section 110(a)(1)), judicial consideration of such decisions may be

available in state court.[33] Moreover, petitioner concedes that under its view of what due process requires, there would be no constitutional question if claims of

[33] The State of Missouri's implementation plan calls for immediate compliance with its emission limitations, and provides a means by which individual sources unable to come into immediate compliance can obtain a variance. Section 203.110, Revised Statutes of Missouri (1972), provides in part:

> "1. The commission may grant individual variances beyond the limitations prescribed in this chapter whenever it is found, upon presentation of adequate proof, that compliance with any provision of this chapter or any rule or regulation, standard, requirement, or order of the commission, or executive secretary will result in an arbitrary and unreasonable taking of property or in the practical closing and elimination of any lawful business, occupation or activity, in either case without sufficient corresponding benefit or advantage to the people; except, that no variance shall be granted where the effect of the variance will permit the continuance of a health hazard; and except, also, that any variance so granted shall not be so construed as to relieve the person who receives the variance from any liability imposed by other law for the commission or maintenance of a nuisance.
>
> "2. In determining under what conditions and to what extent a variance may be granted, the commission shall exercise a wide discretion in weighing the equities involved and the advantages and disadvantages to the applicant and to those affected by air contaminants emitted by the applicant."

As the Intervenor-Respondents explain in their brief (Br. 36–37): "By presenting its feasibility arguments to the state administrative agency, a particular source receives its required hearing on such issues. The right to an administrative hearing implies the right to review in the state courts." See *Indiana & Michigan Electric Co.* v. *Environmental Protection Agency*, *supra*, 509 F. 2d at 847.

infeasibility could be presented at the time of state or federal enforcement proceedings (Pet. Br. 31).[34]

Thus, it is not appropriate to reach petitioner's due process claim since this would require the Court first to decide that economic or technological feasibility could not be considered in any other type of proceeding, state or federal (see notes 33 and 34, *supra*). The court below did not hold that such factors could never be subjected to judicial scrutiny in a federal or state enforcement proceeding or otherwise. That question was not before the court of appeals, as it is not before this Court.

[34] Federal enforcement proceedings are governed by Section 113, 42 U.S.C. 1857c–8. Section 113(a)(1) provides:

"Whenever * * * the Administrator finds that any person is in violation of any requirement of an applicable implementation plan, * * * the Administrator may issue an order requiring such person to comply with the requirements of such plan or he may bring a civil action in accordance with subsection (b)."

If the Administrator chooses to issue an order rather than to proceed directly with a civil action, Section 113(a)(4) provides that such order will not take effect "until the person to whom it is issued has had an opportunity to confer with the Administrator concerning the alleged violation." Further, the order must "specify a time for compliance which the Administrator determines is reasonable, taking into account the seriousness of the violation and any good faith efforts to comply with applicable requirements." If the Administrator chooses not to issue an order, or if the Administrator issues an order that is subsequently violated, Section 113(b) permits him to proceed with a civil action in an appropriate United States district court. The Administrator may seek "appropriate relief" from the court, including an injunc-

Moreover, under petitioner's argument, that due process requires a court to be available at some time to consider infeasibility claims, a holding here that such claims may not be presented in Section 307(b)(1) petitions would mean simply that they could be presented at one of the other times mentioned above. For the reasons stated in Parts A and B, *supra,* infeasibility claims are not cognizable in a petition to a federal court of appeals to review the Administrator's approval of an implementation plan. The merits of petitioner's due process claim in the context of other judicial proceedings is an issue that cannot appropriately be decided here.

---

tion. In some cases (see Section 113(c)(1)) he may seek monetary fines and a term of imprisonment.

It is the position of the Administrator that claims of economic or technological infeasibility are relevant to his fashioning of an appropriate enforcement order under Section 113(a)(4), that is, to his determination of a time for compliance with the plan's requirements which is "reasonable." Presumably, a court, too, in exercising its equitable power to fashion the "appropriate relief" could consider economic and technological factors. Thus, if due process "would call for the presentation of technological and economic factors" in some judicial context (Pet. Br. 31), such a requirement would be satisfied.

It is the Administrator's view, however, that claims of infeasibility are not relevant to whether there has been a violation of the implementation plan. Such claims, in other words, may not be used to render invalid the emission limitations in the implementation plan or as a means of revising or compromising the plan's requirements. Section 113 by its own terms contemplates the fashioning of an enforcement order, by the Administrator or by a court, only after it is determined that a violation has occurred, and only then are infeasibility claims relevant.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.
PETER R. TAFT,
Assistant Attorney General.
A. RAYMOND RANDOLPH, JR.,
Deputy Solicitor General.
STEPHEN L. URBANCZYK,
Assistant to the Solicitor General.
EDMUND B. CLARK,
KATHRYN A. OBERLY,
Attorneys.

DECEMBER 1975.

U.S. GOVERNMENT PRINTING OFFICE: 1976